Office - Supreme Court
FILED
NOV 6 195
JOHN T. FEY, Cle

IN THE

Supreme Court of the United States

October Term, 1956

No. 243

GEORGE E. SHIBLEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

MORRIS LAVINE.
215 West Seventh Street,
Los Angeles 14, California,
Attorney for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

LEEDTHRU

DARK PAGE BE

SUBJECT INDEX

PAGE

I.

The petitioner, a civilian lawyer whose prosecution in the case at bar arose out of his representation of an enlisted man in Marine Corps proceedings, stands convicted upon the unsupported testimony of an adjudicated insane man without (A) any proper predetermination by the trial court of the competency of the insane witness and (B) without proper instructions to the jury as to the weight and credibility to be given to the testimony, if competent, of an insane witness in a criminal trial 4

II.

Petitioner was placed in jeopardy, following a conversation between a juror and the wife of the Assistant United States Attorney after the trial commenced, by the discharge of a juror without petitioner's personal consent. This violated petitioner's rights under the Fifth Amendment to the United States Constitution 12

III.

The conduct and statements of the trial court and the giving of an instruction to the jury that it was its duty to agree, after it had been deliberating 24 hours tended to coerce the verdict of the jury and was an unconstitutional invasion of the right of trial by jury guaranteed by the Fifth and Sixth Amendments to the United States Constitution 15

IV.

The summation of the prosecutor was an appeal to passion and prejudice whose only purpose and effect was improperly to overcome the dispassionate judgment of the jury and influence the verdict 20

PAGE

V.

The offenses charged and of which petitioner was convicted, to-wit: "receiving" and "conspiracy" to steal, receive and convert a copy of a "transcript" does not encompass mere innocent receipt of an unstolen photographic print or negative of the allegedly stolen "copy of the transcript" taken by someone other than petitioner and under the possession and control of such other person 23

VI.

The evidence failed to establish that the "court of inquiry" was a lawfully constituted "court" of the United States, and that the "copy of the transcript" was, in fact, "the property of the United States," having value, rather than a worthless private report of a self-established group of trespassers 26

VII.

The court erroneously excluded evidence of the bad reputation for truth, honesty and integrity of the Government's witness, Thompson, an adjudicated insane man, and the sole witness upon whom the prosecution fundamentally relied and whose testimony the court below concedes was "the evidentiary basis of the jury's verdict" 33

Conclusion 36

DARK PAGE

TABLE OF AUTHORITIES CITED

CASES	PAGE
Allen v. United States, 164 U. S. 492	19
Ashcraft v. Tennessee, 322 U. S. 143	11
Austin v. United States, 208 F. 2d 420	22
Berger v. United States, 295 U. S. 78	7, 10, 21
Bollenbach v. United States, 326 U. S. 607	18
Boyd v. United States, 116 U. S. 616	37
Bram v. United States, 168 U. S. 532	11
Brown v. Mississippi, 297 U. S. 278	11
Burton v. United States, 196 U. S. 283	18, 19
Chambers v. Florida, 309 U. S. 227	11, 37
Chicago & E. I. Ry. Co. v. Sellers, 5 F. 2d 31	19
Christoffel v. United States, 338 U. S. 84	32
Corsen v. United States, 147 F. 2d 437	8
Crawford v. United States, 212 U. S. 183	36
Demetree v. United States, 207 F. 2d 892	19
District of Columbia v. Arms, 107 U. S. 519	7, 8, 11
Dynes v. Hoover (20 How.) 65 L. Ed. 838	26, 27, 28, 32
Edwards v. United States, 7 F. 2d 598	19
Fowlers v. United States, 329 U. S. 187	32
Francis v. Resweber, 329 U. S. 459	37
Gasquet v. Fenner, 235 Fed. 997	8
Glasser v. United States, 315 U. S. 60	13, 14
Gordon v. United States, 344 U. S. 414	10, 35
Henry v. United States, 204 F. 2d 817	19
Herbert v. Louisiana, 27 U. S. 312	37
Hoyt v. Adee, 3 Lans. (N. Y.) 173	8
Hutton, Ex parte, 44 Cal. 32	12
Irvine v. California, 347 U. S. 128	37
Jackson v. Superior Court, 10 Cal. 2d 350	12
Jones v. United States, 175 F. 2d 544	22

LEEDTHRU

PAGE

Lisenba v. California, 314 U. S. 219 37
Louisiana v. Reswebber, 91 L. Ed. 359 12
McClaughry v. Deming, 186 U. S. 49 27
McNabb v. United States, 318 U. S. 322 11
Michelson v. United States, 335 U. S. 469 34
Mooney v. Holohan, 294 U. S. 103 37
New York Central R.R. Co v. Johnson, 279 U. S. 310 22
Oliver, re, 33 U. S. 257, 92 L. Ed. 682 31
Paul, In re, 18 F. 2d 448 8
People v. Gage, 48 Cal. 323 12
People v. Webb, 38 Cal. 467 12
People v. Young, 100 Cal. App. 18 12
Peterson v. United States, 213 Fed. 920 19
Putnam v. United States, 213 Fed. 920 18
Quong Duck v. United States, 293 Fed. 563 18
Runkle v. United States, 122 U. S. 543 27
Samuel v. United States, 169 F. 2d 787 8
Screws v. United States, 325 U. S. 91 11
Shepard v. United States, 64 F. 2d 641 8
Silverthorne Lumber Co. v. United States, 251 U. S. 385 37
Simmons v. United States, 206 F. 2d 427 22
Snyder v. Massachusetts, 291 U. S. 97 ..... 36, 37
Stewart v. United States, 300 Fed. 769 19
United States v. American Die and Instrument Works, 213 F. 2d 731 22
United States v. Lefkowitz, 285 U. S. 452 37
United States v. Rumley, 345 U. S. 42 32
Viereck v. United States, 318 U. S. 236 ..... 7, 11, 22
Weeks v. United States, 232 U. S. 383 37
Wissel v. United States, 22 F. 2d 468 18

DARK PAGE B

STATUTES

	PAGE
Article of War 121	30
Article of War 135	30
Article of War 135(c)	31
California Code of Civil Procedure, Sec. 1880(1)	7
California Code of Civil Procedure, Sec. 2051	34, 35
Code of James II (Eng., 1682)	30
Federal Rules of Criminal Procedure, Rule 52(b)	22
Military Code, Art. 138	4, 29, 30
United States Code, Title 18, Sec. 641	23, 25
United States Code, Title 50, Sec. 731	30
United States Code, Title 50, Sec. 734	4, 29
United States Constitution, Art. III	27
United States Constitution, Fifth Amendment	2, 5, 36
United States Constitution, Sixth Amendment	2

TEXTBOOKS

Cooley's Constitutional Limitations, p. 405	12
70 Corpus Juris, Sec. 123, p. 94	8
Manual for Courts-Martial (1951), p. 14, para. 8	28
Naval Supplement to the Manual for Courts Martial, U. S. (1951), par. .0204, pp. 26-27	31
Naval Supplement to the Manual for Courts Martial, U. S. (1951), par. .0302, pp. 29-30	31
Naval Supplement to the Manual for Courts Martial, U. S. (1951), par. .0403, p. 71	31
8 Opinions Attorney General (1857), pp. 335, 347	31
Snedeker, Military Justice Under the Uniform Code, Sec. 501 (c), p. 77	27
5 Wigmore, Evidence (3rd Ed.), Sec. 1617, p. 491	35
5 Wigmore, Evidence (3rd Ed.), Sec. 1618, p. 491	35
Winthrop, Military Law and Precedents (1920), pp. 523, 528	32
Winthrop, Military Law and Precedents (2d Ed.), pp. 53, 54, 55	27
Winthrop, Military Law and Precedents (2d Ed.), pp. 926-936	30

IN THE

Supreme Court of the United States

October Term, 1956

No. 243

GEORGE E. SHIBLEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

To: The Honorable Earl Warren, Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

COMES NOW George E. Shibley, Petitioner, and moves this Honorable Court for a Rehearing in the above entitled matter and to grant a petition for writ of certiorari on the following grounds, to wit:

THE PETITIONER HAS OVERLOOKED PRESENTING IMPORTANT POINTS OF LAW WHICH ARE FUNDAMENTAL IN THE ADMINISTRATION OF CRIMINAL JUSTICE AND WHICH SHOULD BE FULLY PRESENTED AND URGED BEFORE THIS HONORABLE COURT BEFORE THE CAUSE BECOMES FINAL. THESE POINTS REQUIRE URGENT AND PLENARY CONSIDERATION BY THIS HONORABLE COURT, TO-WIT:

(1) The Petitioner, a civilian lawyer whose prosecution in the case at bar arose out of his representation of an enlisted man in Marine Corps proceedings, stands convicted upon the unsupported testimony of an adjudicated insane man without (a) any proper pre-determination by the trial court of the competency of the insane witness and (b) without proper instructions to the jury as to the weight and credibility to be given to the testimony, if competent, of an insane witness in a criminal trial.

(2) Petitioner was placed in jeopardy, following a conversation between a juror and the wife of the Assistant United States Attorney after the trial commenced, by the discharge of a juror without petitioner's personal consent. This violated Petitioner's rights under the Fifth Amendment to the United States Constitution.

(3) The conduct and statements of the trial court and the giving of an instruction to the jury that it was its duty to agree, after it had been deliberating 24 hours tended to coerce the verdict of the jury and was an unconstitutional invasion of the right of trial by jury guaranteed by the Fifth and Sixth Amendments to the United States Constitution.

(4) The summation of the prosecutor was an appeal to passion and prejudice whose only purpose and effect was improperly to overcome the dispassionate judgment of the jury and influence the verdict.

(5) The offenses charged and of which petitioner was convicted, to wit: "receiving" and "conspiracy" to steal, receive and convert a copy of a "transcript" does not encompass mere innocent receipt of an unstolen photographic print or negative of the allegedly stolen "copy of the transcript" taken by someone other than petitioner and under the possession and control of such other person.

(6) The evidence failed to establish that the "Court of Inquiry" was a lawfully constituted "court" of the United States, and that the "copy of the transcript" was, in fact, "the property of the United States", having value, rather than a worthless private report of a self-established group of trespassers.

(7) The court erroneously excluded evidence of the bad reputation for truth, honesty and integrity of the Government's witness, Thompson, an adjudicated insane man, and the *sole* witness upon whom the prosecution fundamentally relied and whose testimony the court below concedes was "the evidentiary basis of the jury's verdict".

I.

The Petitioner, a Civilian Lawyer Whose Prosecution in the Case at Bar Arose Out of His Representation of an Enlisted Man in Marine Corps Proceedings, Stands Convicted Upon the Unsupported Testimony of an Adjudicated Insane Man Without (A) Any Proper Predetermination by the Trial Court of the Competency of the Insane Witness and (B) Without Proper Instructions to the Jury as to the Weight and Credibility to Be Given to the Testimony, if Competent, of an Insane Witness in a Criminal Trial.

This case involved the alleged taking of a purported "copy" of a report or transcript of a proceeding of a "Court of Inquiry" at the El Toro Marine Air Base by one Charles Raymond Thompson, a Marine Reserve.

The petitioner, an outstanding lawyer, a graduate of Stanford University and of the Stanford Law School, and a member of the Bar of California for two decades, was retained to represent a Marine at El Toro, California facing charges of violation of certain military regulations. In the course of his successful efforts to acquit his client, Petitioner, as civilian counsel, made charges under Article 138 of the Military Code accusing the Commanding General and his subordinates at the Marine Base of committing wrongs against Petitioner's client. Although under the express provisions of Article 138 (50 U. S. C. 734) embodying almost three hundred years of established precedents, it was required that Petitioner's complaints be referred to an officer superior to the Commanding General, nevertheless the plain mandate of the Military Code was flouted and the accused general convened an illegal "court" of his own subordinates to investigate the charges against himself. The conviction herein was the culmination of

a long series of reprisals by military officials who would not brook such vigorous defense of an enlisted man by independent civilian counsel, such reprisals including the unprecedented arrest of petitioner in his law offices by armed Marines, his being taken by force to the military Base at El Toro, a harassing interrogation before the court of inquiry", illegally convened by the accused Commanding General, and a virtually unprecedented prosecution in the Federal Court for "contempt" of the alleged "court of inquiry."[1]

In the case at bar petitioner was convicted upon the testimony of Government witness Thompson, a Marine Reserve. Thompson, it developed during the trial, had been adjudicated insane, and said adjudication had never been set aside. The court below correctly concluded that the testimony of Thompson was the "sole support" of a considerable portion of the case for the prosecution, and the "evidentiary basis for the verdict of the jury."

Attorney Shibley was given a sentence of imprisonment of three years based upon the testimony of the insane witness. We contend that due process of law guaranteed by the Fifth Amendment to the Constitution forbids a conviction based on such testimony to stand. This court should, in its supervisory capacity over criminal cases, pass upon this most important question.

Thompson, when first interviewed by a representative of the Office of Naval Intelligence five months after the copy of the transcript was said to have been missed, denied

---

[1]Petitioner was acquitted by the jury but after the verdict the trial court sentenced petitioner to thirty days imprisonment in summary contempt proceedings. (See Shibley v. United States (C. A. 9, No. 14464, opinion unreported) and Shibley v. United States, S. Ct., October 1956 Term, No. 322.)

that he had anything to do with its taking [R. 194][2] and told the investigator, upon inquiry, that petitioner had nothing to do with it [R. 184]. Thompson was arrested on May 26, 1953 [R. 185], before the filing of the indictment and continued to deny his guilt until the opening day of the trial, December 8, 1953, when for the first time Thompson changed his plea [R. 3-5], pleading guilty to counts 1 and 4 of the indictment, after which counts 2 and 3 were dismissed. Imposition of sentence was postponed until conclusion of the trial, during which time he was allowed to remain free on his own recognizance [R. 5]. He became the principal Government witness whose testimony laid the main framework of the case according to the court below, and at the conclusion of the trial he received a suspended sentence [C. Tr. 119].[3] During all of these proceedings the government said nothing about his mental status, a history of which it undoubtedly had, if nothing else, as a part of his military record.

During the trial proceedings the defense developed evidence that Thompson had been adjudicated insane; had been confined in mental institutions on three different occasions; that the adjudication never had been set aside nor had there ever been any determination that Thompson's sanity was restored. The Government did not rebut this evidence and it stands in the record uncontradicted.

On the unfoldment of these facts, it then became the duty of the trial court to immediately examine into the competency of Thompson, for, both at common law and

---

[2]References designated "R" are to the Reporter's transcript of proceedings.

[3]References designated "C. Tr." are to the Clerk's transcript of record below.

under rules of evidence generally applicable and particularly under California law, a witness who is of unsound mind is an incompetent witness incapable of testifying. (Calif. Code Civ. Proc., Sec. 1880, subsec. 1.) The Government, by calling Thompson, necessarily vouched for him as a witness.

Government counsel did not call to the attention of either Court or opposing counsel that Thompson had been adjudicated insane. This it had a duty to do, since the attorney for the Government is attorney for all the people. (*Berger v. United States*, 295 U. S. 78; *Viereck v. United States*, 318 U. S. 236, 248.)

Although it has been held in one early case that mental illness does not necessarily disqualify the witness from testifying or being allowed to testify (*District of Columbia v. Arms*, 107 U. S. 519), the court there sets out the procedure which it is necessary to follow to establish competency of such testimony. Under the Arms view, where it appears that a witness is or has been insane, it becomes the duty of the court to first examine into the witness's ability to understand the oath and into his ability to give a correct account of the matters which he has seen or heard in reference to the questions at issue; such examination and whether or not the insane witness has the necessary understanding to raise him to the level of competency are matters which must be passed upon by the court, which has the affirmative duty of pre-determining the insane witness's competency. As the court stated therein (2 S. Ct. at p. 842):

> "It is undoubtedly true that a lunatic or insane person may, from the condition of his mind, not be a competent witness. *His incompetency on that*

> *ground,* like incompetency for any other cause, ***must be passed upon by the court,*** and to aid its judgment evidence of his condition is admissible. . . . The general rule, therefore, is that a lunatic or a person affected with insanity is admissible as a witness if he have sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of the matters which he has seen or heard in reference to the questions at issue; and ***whether he have that understanding is a question to be determined by the court, upon examination of the party himself, and any competent witnesses who can speak to the nature and extent of his insanity.*** Such was the decision of the court of criminal appeal in England, in the case of Reg. v. Hill, 5 Cox, Crim. Cas. 259." (Our emphasis).

It has been said in another early case that inquisition of lunacy found against one is *prima facie* evidence of his incompetency as a witness, and unless it be overcome by evidence of his sanity he should not be permitted to testify, even as against one not a party to the proceedings in lunacy. (*Hoyt v. Adee,* 3 Lans. (N. Y.) 173; Vol. 70, Corpus Juris, Witnesses, Sec. 123, p. 94.

Even then, if the court should determine that the witness does understand the meaning and sanctity of the oath and that he has ability to recollect and narrate events, the weight and credibility of the witness thereafter becomes a question of fact for the jury under careful and proper instructions to the jury. (*District of Columbia v. Arms, supra; Corsen v. United States,* 147 F. 2d 437; *Samuel v. United States,* 169 F. 2d 787, 792; *In re Paul,* 18 F. 2d 448; *Gasquet v. Fenner,* 235 Fed. 997; *Shepard v. United States,* 64 F. 2d 641.) In the case at bar neither

requirement was satisfied: the trial court failed to examine into or determine the competency of the adjudicated insane witness and the court failed to give any proper instructions to the jury from which it could determine the weight and credibility to be accorded the testimony of an insane person.

After the evidence developed that Thompson had been adjudicated insane and had been in mental institutions,[4] the court did not in any way stop the proceedings to examine into Thompson's competence as a witness in accordance with the requirements set forth in the Arms decision. The trial judge allowed this insane witness to go on and testify as though his views were gospel truth and trifles light as air became as solemn and weighty as the Holy Writ. The trial judge at the conclusion failed to give any instructions to the jury on the weight and credibility to be given the testimony of the insane witness.

The Solicitor General, in opposition to the Writ of Certiorari, stated: "The credibility of witnesses was a matter for the jury to determine under appropriate instructions. *Such instructions were given.* [7 R. 471-72, 475, 477]." (Our emphasis). Despite such representation by Government counsel, no instructions whatsoever were given to the jury on the weight and credibility to

---

[4]Thompson was confined in a private sanitarium for the mentally afflicted and sick in New Orleans in 1949 [R. 168], where he received electric shock therapy [R. 169]. In the same year, he was also confined in the Gulfport Hospital in Mississippi, a veterans' hospital, for a mental affliction [R. 169]. On April 28, 1950, he was confined in the State Institution in Central Louisiana at Pineville, Louisiana, by an order issued out of the 15th Judicial Court of Louisiana, for the Parish of Vermillion in the town of Abbeville [R. 167]. As of the time he testified, the order of commitment had not been set aside [R. 168].

be given the testimony of an adjudicated insane witness who had been confined three times in mental institutions, and the jury was left without "rudder or oar" to determine its most important issue; namely, whether the conviction of a leading and reputable attorney could be based upon the sole testimony of an adjudicated insane witness, whose adjudication of insanity had never been set aside.

There is the presumption that a condition once determined to exist continues to exist until set aside. While it is a rebuttable presumption, there was no evidence to rebut this presumption in this case. Once insanity was shown to exist in the witness, the burden of proof as to his competency shifted to the Government. In this case the Government did not assume the burden, and never proved his competency.

The conviction, the judgment of imprisonment of three years, and the termination of an outstanding legal career of two decades, in this case therefore rests upon the testimony of this adjudicated insane man. Remove it from the case and there is absolutely nothing with which to sustain the conviction and its resulting tragedy.

As was stated by this Court recently in *Gordon v. United States*, 344 U. S. 414, 417: "Where, as here, the Government's case may stand or fall on the jury's belief or disbelief of one witness, his credibility is subject to close scrutiny." If counsel for the Government is counsel for all the people (*Berger v. United States, supra*) it was the duty of Government counsel to disclose the mental condition of its principal witness. Since he was in the Marine Corps and then in the Reserves, his record must have been fully before them, including the history of his adjudicated insanity. It was the duty of the trial court thereafter to make an examination, first of all,

into Thompson's competency. (*District of Columbia v. Arms, supra.*) This was a question which required the same determination as in a "third degree" case where the court is under a manifest duty in the first instance to examine the evidence to see if a confession is free and voluntary. (*Ashcraft v. Tennessee,* 322 U. S. 143; *Chambers v. Florida,* 309 U. S. 227; *Brown v. Mississippi,* 297 U. S. 278; *Bram v. United States,* 168 U. S. 532, 541; *McNabb v. United States,* 318 U. S. 322.) Until the court has performed this function, the testimony of the witness is improperly received.

This Court should pass upon this very important issue in its supervisory capacity over criminal procedure. Although in the case of *District of Columbia v. Arms, supra,* the procedure to be followed is set out, that case did not fully raise the question of great importance raised in the case at bar in its present setting where the procedure was not followed. In the *Arms* case the court there did point out the necessity of the court's determining the competency of the witness in the first instance and then appropriately instructing the jury as to the credibility of *such a witness,* if the witness is allowed to testify. Here there was no instruction as to the credibility to be given or lack of credibility to be given to a witness who has once been adjudicated insane. It was the duty of the court to do so, and this Court should grant certiorari to say so. (*Screws v. United States,* 325 U. S. 91, 107; *Viereck v. United States,* 318 U. S. 236, 247, 248.)

The question raised here was not appropriately or fully presented in our original petition and is one of such great and fundamental importance as to require the plenary consideration of this Court and the granting of the Writ.

II.

Petitioner Was Placed in Jeopardy, Following a Conversation Between a Juror and the Wife of the Assistant United States Attorney After the Trial Commenced, by the Discharge of a Juror Without Petitioner's Personal Consent. This Violated Petitioner's Rights Under the Fifth Amendment to the United States Constitution.

The record of the proceedings for the morning of Wednesday, December 9, 1953, in the trial court shows that on the previous afternoon a juror talked to the wife of the Assistant United States Attorney prosecuting the case [R. 151, 152, 153]. The exact circumstances of the incident do not fully appear in the record and the offer of another juror, who appears to have been a witness to the discussion between the wife of the prosecutor and the first juror, to disclose the circumstances was rejected by the court [R. 153].

The trial court discharged the first juror and substituted an alternate. Counsel for petitioner agreed but not petitioner personally. Substitution was made without petitioner's consent and, in fact, without asking him whether or not he consented to the discharge and substitution [R. 151, 152].

Jeopardy had thereupon attached. (*People v. Young*, 100 Cal. App. 18; *Jackson v. Superior Court*, 10 Cal. 2d 350; *Louisiana v. Resweber*, 91 L. Ed. 359; *Cooley's Constitutional Limitations* (4th Ed.) 405; *People v. Webb*, 38 Cal. 467; *People v. Cage*, 48 Cal. 323; *Ex parte Hutton*, 44 Cal. 32.)

In *People v. Young, supra*, 279 Pac. 824, when the jury was completed and regularly empaneled and sworn,

the court held that the defendant was placed in jeopardy by a subsequent allowance of a peremptory challenge by the prosecution resulting in the excusing of one juror and the substitution of another juror.

Individual constitutional rights of an accused cannot be waived by the attorney, but must be waived by the defendant personally. Here there was no personal waiver. No one asked petitioner whether he consented to the discharge and substitution or whether he waived the constitutional right involved. The fact that petitioner was an attorney, which the Court of Appeals mentioned in its opinion, did not change his constitutional rights, and did not alter the requirement. (*Glasser v. United States,* 315 U. S. 60, 69, 70.)

In the *Glasser* case this Court stated:

> "To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights. . . . The fact that Glasser is an attorney is, of course, immaterial to a consideration of his right to the protection of the Sixth Amendment. His professional experience may be a factor in determining whether he actually waived his right to the assistance of counsel . . . but it is by no means conclusive."

In many respects the position of petitioner in the case at bar is stronger than that of *Glasser.* In *Glasser,* the attorney-defendant appeared as his own counsel in association with another attorney, and defendant Glasser actually participated in a discussion before the court with reference to the matter there involved, representation by counsel.

In the case at bar petitioner did not appear as his own counsel, did not participate in the proceedings other than as a witness, was not consulted by the court with reference to the discharge of the juror and substitution of another. In fact, no reference to or concern for petitioner's wishes or feelings in the matter was shown by the trial court. Moreover, in *Glasser* the proceedings were before the court alone; in the instant case the discharge and substitution of the juror was in the presence of the entire jury; the perils, fears and embarrassment of a defendant, represented by counsel, abruptly and without invitation by the court, speaking out in the presence of the jury on a matter involving members of the jury themselves, cannot be minimized even where the defendant is himself an experienced attorney.

Under a less aggravated factual situation, this Court in the *Glasser* decision stated:

> "Under these circumstances to hold that Glasser freely, albeit tacitly, acquiesced in the appointment of Stewart is to do violence to reality and to condone a dangerous laxity on the part of the trial court in the discharge of its duty to preserve the fundamental rights of an accused."

Silence of a defendant on a constitutional subject does not constitute a waiver of his constitutional rights. Here there was no express waiver and jeopardy attached. The presence or absence of prejudice cannot be determined as a matter of law. The presumption is that the denial of a fundamental constitutional right is, in itself, prejudicial. (*Glasser v. United States,* 315 U. S. at pp. 75, 76.)

III.

The Conduct and Statements of the Trial Court and the Giving of an Instruction to the Jury That It Was Its Duty to Agree, After It Had Been Deliberating 24 Hours Tended to Coerce the Verdict of the Jury and Was an Unconstitutional Invasion of the Right of Trial by Jury Guaranteed by the Fifth and Sixth Amendments to the United States Constitution.

The jury in the case at bar retired at 11:36 A. M. on Friday, December 11, 1953. At 3:20 P. M. on the same day the jury returned to the courtroom [R. 509] and the foreman stated the jury desired to have the testimony of Cpl. Huckenphaler reread [R. 509]. This was done [R. 509-61]. The jury again retired at 4:13 p. m. on Friday [R. 561].

The jury returned to the courtroom at 11:00 a. m. the next day, Saturday, December 12 [R. 561]. They wished some explanation of the instructions [R. 561].

> "The Foreman: On Count Four concerning conspiracy. We would like to have the instruction repeated. We understand it was not read. Your Honor said it was too lengthy to read or something like that [See, R. 483].
>
> The Court: I will give you the instruction I read to you yesterday on conspiracy. Is that what you want?
>
> The Foreman: I think so." [R. 561-2.]

The court reread a portion of the instructions previously given [R. 562-67]. The court then inquired if the jury thought that the instruction which he had just given would help; he stated: "I realize that you have been out nearly twenty-four hours"; and then stated: "I want

to give you one additional instruction that may help you" [R. 567]. The court then stressed that the trial had been long and expensive; if the jury failed to agree another expensive trial would be entailed; the court didn't want any juror to surrender his conviction, but the questions should be considered with a proper regard and deference to the opinions of each other; if the larger number are for conviction, a dissenting juror should consider under the circumstances whether his own doubt is a reasonable one, and *vice versa* [R. 568-70]. The court indicated that he was trying "to follow the language of the United States Court in Allen v. United States" [R. 571]. An exception was noted to the instruction [R. 571]. The court agreed that he didn't want anybody to surrender their honest convictions. The court then immediately added:

> "I might say that I will be here until noon and after that I am going to return home. And I think also counsel will want to be on their way. They can assemble again in about an hour or so on notice anytime between now and tomorrow evening." [R. 572.]

Counsel for petitioner stated that all of his time was available to his client [R. 572]. The court stated:

> "Well, we are all in the same boat, gentlemen, counsel on both sides and the court. *We are at the mercy of the jury*" [Emphasis ours; R. 572].

The jury retired at 11:05 a. m., and in one-half hour were back with their verdict [R. 572].

As previously indicated, the case against petitioner was more than doubtful. The jury had been deliberating for twenty-four hours. They returned to court on Saturday morning, really to ask for an explanation of the charge

in the indictment which the trial court had not fully made clear, but instead were given a portion of the court's charge on the abstract law of conspiracy. Having received the instruction, it might be expected that they would be permitted to retire to resume their deliberations, the jury not having indicated that they did not feel they could reach an agreement. Instead, they were given an instruction whose tendency to coerce a verdict has been noted by the courts which should now be passed upon by this court in its supervisory capacity over criminal justice. The jury were told that if they did not agree within the hour, the court and counsel would be gone and the jury might be compelled to stay together over the week-end. They were told that it might be possible to get court and all counsel together on an hour's notice, but any reasonable person could conclude that such hope might not be fulfilled over the week-end. When the trial court took it upon himself to say that "counsel will want to be on their way" and the attorney for petitioner tried to stem the tide by asserting that all of his time was available to his client, the court then pointed out in effect that counsel and the court, so far as the week-end was concerned, were "at the mercy of the jury." It is difficult to escape the conclusion that the jury, which had just come out to obtain further instructions on the conspiracy count, could not help being convinced from all that occurred that the trial court desired their deliberations to come to an immediate conclusion; that if they did not, they might find themselves detained over the week-end, and the more they deliberated, the less merciful were they being to court and counsel. This conclusion seems warranted because the jury after having deliberated for twenty-four hours, took no more time than it takes to write their verdict.

We ask this Court to re-examine the so-called Allen Instruction in the light of its own subsequent instruction in *Bollenbach v. United States,* 326 U. S. 607, wherein this Court has pointed out that where a jury has been deliberating for some time and has frayed nerves, the giving of an instruction at such crucial time improperly sways it.

The Allen Instruction unconstitutionally invades the province of the jury to deliberate and reach a verdict unhampered by any remarks such as those contained in this instruction. There is *no duty* on the part of the jury to agree, but only to reach an independent conscientious view of the evidence. There is *no duty* on the part of a jury to reach a final disposition of the case. If the asking of a jury is to how it stands numerically violates the defendant's right to trial by jury, how much more does this instruction violate the defendant's constitutional rights? (*Burton v. United States,* 196 U. S. 283, 304, 308.)

The impropriety of giving this type of an instruction in the setting of this case is easily manifest. It is coercive, it compel's minority jurors to surrender their individual views. (*Putnam v. United States,* 213 Fed. 920, 926; *Quong Duck v. United States,* 293 Fed. 563; *Burton v. United States, supra.*)

As pointed out by the court in *Wissel v. United States,* 22 F. 2d 468, 471 (C. A. 2, 1927):

> "The cases all recognize that the surrender of the independent judgment of a jury may not be had by command or coercion. It is not enough to cure the error to conventionally say that it is the function of the jury to decide questions of fact. Pressure of

> whatever character, whether acting on the fears or hopes of the jury, if so exerted as to overbear their volition without convincing their judgment, is a species of restraint under which no valid judgment can be made to support a conviction."

While a paraphrase of the instruction which was recited in *Allen v. United States,* 164 U. S. 492, 501, has on occasion been upheld, it has been constantly recognized that the instruction is by its nature coercive and if other circumstances are combined with such coercive charge as to influence the verdict of the jury, the action of the trial court may not stand. As this Court stated in *Burton v. United States,* 196 U. S. 283, 307, where in addition to the Allen charge the trial court had also asked the jury how they stood numerically: "A slight thing may have turned the balance against the accused under the circumstances shown by the record." A similar result was reached under different circumstances in *Stewart v. United States,* 300 Fed. 769, 782 (C. A. 8, 1924). (See also, *Chicago & E. I. Ry. Co. v. Sellers,* 5 F. 2d 31 (C. A. 8, 1925); *Edwards v. United States,* 7 F. 2d 598, 602 (C. A. 8, 1925).) The court below had occasion to consider the same problem in *Peterson v. United States,* 213 Fed. 920 (C. A. 9, 1914). In reversing the judgment of conviction, the court held that the instructions which paraphrased *Allen* were coercive under the circumstances. "Can there be any question that, retiring with the impression that the all-important thing was a final disposition of the case, the jurors consciously or unconsciously bartered the acquittal of one defendant for the conviction of the other" (at p. 926). (See also, *Demetree v. United States,* 207 F. 2d 892 (C. A. 5, 1953) and *Henry v. United States,* 204 F. 2d 817 (C. A. 6, 1953).)

IV.

The Summation of the Prosecutor Was an Appeal to Passion and Prejudice Whose Only Purpose and Effect Was Improperly to Overcome the Dispassionate Judgment of the Jury and Influence the Verdict.

Counsel for the Government concluded his opening summation to the jury with the following statement:

> "Ladies and gentlemen, this isn't a simple burglary case. This is a case of taking documents from the United States Government. It is your Government and mine. *This could very well have been an atom secret* or anything else. It is Government property. *And it is a threat to our security if we let it go unpunished.*" [R. 413.] (Our emphasis.)

Government counsel was certainly as familiar with the case and the record he made as anyone at the trial. He had produced military officials including Corporal Huckenphaler as witnesses at the trial. All were familiar with the transcript of the "Court of Inquiry." Some had been present throughout the hearing. There was not the slightest intimation that the transcript, or its contents, were "secret," "classified," "confidential" or "restricted." The record was clear that the "Court of Inquiry" was purportedly examining into charges of personal derelictions by military officers with respect to petitioner's client, Sergeant Bennette, involving Bennette's alleged transportation of Marines to and from the base for pay, and trying to compel petitioner to reveal the details of his charges against the Commanding General. There were no *"atom secrets"* involved, and none could be. There was no claim that petitioner was engaged in the business generally

of stealing transcripts. There was one specific document involved in the charge in the indictment and at the trial, a seventh or eighth carbon copy of a transcript could reflect no more than dispute between the officers and petitioner as to their respective legal rights to obtain or withhold information about personal charges made by petitioner. Nothing in the evidence or the record justified such comments by the prosecutor as *"this could very well have been an atom secret or anything else"* and *"it is a threat to our security if we let it go unpunished."* In the light of the well known public feeling and dread concerning the purloining of *"atom secrets,"* such remarks by the prosecutor here could only have been calculated to incite passion and prejudice against this petitioner and to overcome independent judgment with respect to the insubstantiality of the case against petitioner.

While a prosecutor

> "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (*Berger v. United States,* 295 U. S. 78, 88.)

> "The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of

counsel to passion or prejudice." (*N. Y. Central R. R. Co. v. Johnson*, 279 U. S. 310, 318.)

See also:

Viereck v. United States, 318 U. S. 236, 247;

United States v. American Die and Instrument Works, 213 F. 2d 731 (C. A. 3, 1954).

Appellate courts will exercise their authority under Rule 52(b) of the Federal Rules of Criminal Procedure where error has affected the substantial rights of an appellant. (*Jones v. United States*, 175 F. 2d 544 (C. A. 9, 1949); *Austin v. United States*, 208 F. 2d 420, 421 (C. A. 5, 1953); *Simmons v. United States*, 206 F. 2d 427, 429 (C. A., D. C., 1953).) As this Court indicated in *Viereck v. United States, supra* (p. 248):

> "At a time when passion and prejudice are heightened by emotions stirred by our participation in a great war, we do not doubt that these remarks addressed to the jury were highly prejudicial, and that they were offensive to the dignity and good order with which all proceedings in court should be conducted. *We think that the trial judge should have stopped counsel's discourse without waiting for an objection.*" (Our emphasis.)

V.

The Offenses Charged and of Which Petitioner Was Convicted, to-wit: "Receiving" and "Conspiracy" to Steal, Receive and Convert a Copy of a "Transcript" Does Not Encompass Mere Innocent Receipt of an Unstolen Photographic Print or Negative of the Allegedly Stolen "Copy of the Transcript" Taken by Someone Other Than Petitioner and Under the Possession and Control of Such Other Person.

The court below has overlooked the important issue as to whether the admittedly *unstolen* photographic negatives, if received by petitioner, constituted "receiving, concealing or retaining" government property with intent to convert, within the meaning of Title 18, Section 641. The uncontradicted evidence in this case is that petitioner did not "receive" the allegedly stolen seventh or eighth carbon copy of the transcript of the "Court of Inquiry"; this "copy of the transcript", if it was a "copy", was mailed on to Drew Pearson by prosecution witness Thompson and his roommate Pat Fields, a perennial legman for news columnist Drew Pearson [R. 230-234]. The enterprise of such a newsgetter is well known to the Court, and the zealousness with which it is sought to obtain information not otherwise available is a matter of common knowledge. Likewise in the realm of common knowledge is the intermittent battle carried on in his column by Pearson against the Marine "Brass" during 1952.

The uncontradicted evidence in this case is that Thompson and Pearson's legman, Pat Fields, mailed to petitioner and to his attorney what appeared to be Christmas pack-

age, the package addressed to petitioner containing *unstolen* photographic negatives and the package to petitioner's attorney containing *unstolen* photographic prints of the seventh or eighth alleged carbon copy of the transcript [R. 231-33]. It is uncontradicted that both packages were sent by registered mail, return receipt requested, thus requiring petitioner and his attorney to give indelible written evidence of their connection, however remote, with the alleged stolen "copy" of the transcript [R. 230-34].[5] However, the fact remains that the article "received" through the mail by petitioner was not a "stolen" copy, or "property of the United States". The uncontradicted evidence of the Government is that this package contained *unstolen* photographic negatives made by a photo shop and paid for by prosecution witness Thompson [R. 396-99]. The allegedly stolen carbon copy was not "received" by petitioner at any time but addressed and mailed to Drew Pearson by Pearson's legman, Pat Fields, in cooperation with witness Thompson.

One who receives an *"unstolen"* photograph of a stolen article cannot be said to be a "receiver" of the stolen

---

[5]This could well have been done by Thompson and Fields to establish an explanation and alibi in advance, since broadcasting or printing material from the "transcript" might cause inquiry. It is incomprehensible that the "receiver" would part with the "copy". Had Shibley "received" and kept the "copy" and had the photographs been sent on to Pearson the situation would have been different. But the uncontroverted testimony is that Thompson and Pearson's legman, Fields, sent on the "copy" which forms the basis of the charges, to Drew Pearson. Neither the actual "copy" itself or Pearson were ever produced in court.

article. To so hold would be to say that one who is handed a photograph of a stolen Cadillac has by that fact become a "receiver" of a stolen Cadillac. Nor does the scope of the offense of "receiving" become larger in the case of documents. Congress may make it an offense to receive an *unstolen* photograph of a document but, to date, it has not done so.

Does the word "receiving" as contained in Title 18, Section 641 encompass the act of "not receiving" the stolen thing, but only "receiving" an *unstolen* photographic copy of the thing allegedly stolen? The very question answers itself in the negative. Congress has never had any trouble expressing itself in words. If mere receipt of an unstolen photostat or photograph of a document is to be made a violation of the law, Congress could and should say so and not the judiciary. "Receiving, concealing or retaining" does not mean its very antithesis, that is to say, *"not receiving, not concealing and not retaining"* a document which is mailed on by a columnist's legman to his perennial employer, a newspaper man by whom the document, however worthless, is assumedly received, concealed and retained. The question posed herein should be decided by this Honorable Court.

VI.

The Evidence Failed to Establish That the "Court of Inquiry" Was a Lawfully Constituted "Court" of the United States, and That the "Copy of the Transcript" Was, in Fact, "the Property of the United States", Having Value, Rather Than a Worthless Private Report of a Self-established Group of Trespassers.

In the case at bar, there was an absolute failure to prove that the "copy of a transcript", if one existed, was that of a lawfully constituted "court" of the United States, rather than a valueless private report of an illegal group of Trespassers.

More than this, the only evidence in the record touching upon the legality of the alleged "court of inquiry" [C. Tr. 19-24] affirmatively shows that the alleged "court" was unlawfully constituted, and convened in total disregard of the law, and was a void self-established group of trespassers. The same evidence compels the conclusion that the "copy of the transcript" was not that of a lawful "court" of the United States and thus the "property of the United States" having *some* value, but rather a valueless private report of an unlawful band of trespassers.

As early as 1847 this Court held in the case of *Dynes v. Hoover*, 20 How. 65, L. Ed. 838, that when the law for convening military courts and directing their proceedings for organization have been disregarded, *that everything which may be done is void, and that in such a case "the court and the officers are all trespassers":*

> *"In such cases, everything which may be done is void —not voidable, but void;* and civil courts have never failed, upon a proper suit, to give a party redress, who has been injured by a void process or void judg-

> ment. In England, it has been done by the civil courts, ever since the passage of the Mutiny Act of William and Mary, ch. 5, 3d April, 1689. And it must have been with a direct reference to what the law was in England that this court said, in *Wise v. Withers*, 3 Cr. 337, that in such a case 'the court and the officers are all trespassers.'" (Our emphasis.)

The correctness of the position taken in the *Dynes* case has, of course, never been seriously doubted.

There is, of course, no presumption that a military "court" is a lawful court having legal "existence" or jurisdiction and before its judgments may be recognized *it must appear affirmatively and unequivocally that it was constituted according to law, that it had jurisdiction, that it complied with all of the statutory regulations governing it and that its order or sentence conformed to the law.* (*Runkle v. United States*, 122 U. S. 543, 555; *McClaughry v. Deming*, 186 U. S. 49; *Dynes v. Hoover, supra.*)

The above legal principles flow, among other things, from the fact that military courts *are not courts established under the Judiciary Article*, Article III of the Constitution, (Snedeker, *Military Justice Under the Uniform Code*, Sec. 501 (c) p. 77; Winthrop, *Military Law and Precedents*, 2d Ed., p. 53); *they are impermanent, temporary, summary tribunals;* (Snedeker, *supra*, p. 77; Winthrop, *supra*, p. 54); *a military tribunal is not "a court of record, has no fixed place of session, no permanent office or clerk, etc.,"* (Winthrop, *supra*, pp. 54, 55); *it has no inherent or implied powers and its "judgments" or "orders" are simply recommendations.* (Winthrop, *supra* p. 55.)

Under the concept of the "requisites of a military court" approved by this Court in *Dynes v. Hoover, supra,* and

incorporated in the *Manual for Courts-Martial, 1951,* Para. 8, p. 14, "lack of jurisdiction" of a military court means either that *no lawful court ever actually existed, or, if it was lawfully conceived that by reason of certain fatal defects, its very existence was destroyed ab initio.*

It is in connection with this concept of "non-existence" that this Court in *Dynes v. Hoover* stated: ". . . *in such cases everything which may be done is void . . . not voidable, but void; and . . . in such a case 'the court and its officers are all trespassers'.*" (Our emphasis.)

In the case at bar the Government utterly failed to establish the "lawful and legal existence" of the alleged "court of inquiry", that the "court" was a "Court of the United States" rather than an unlawful band of interlopers and that a copy of a "transcript" allegedly prepared by it was thus the "property of the United States" rather than that of a group of trespassers; further the only "value" which a "copy of a transcript" could have failed of proof when the Government failed to prove it a copy of a transcript of a lawful court.

The only evidence in the record as to the character of the alleged "court" consists in the factual and circumstantial allegations in the sworn affidavit of petitioner in support of his motion for disclosure of grand jury minutes [C. Tr. 19-24]. *None of these sworn allegations were ever factually or circumstantially denied by the Government, and none were ever denied under oath; to this day they stand uncontroverted in the record.*

These facts show that petitioner, during the course of a pre-trial investigation of his client Master Sergeant John R. Bennette, wrote to the Commandant of the Marine Corps complaining of "wrongs being inflicted on Bennette by the Commanding General and his subordinates at El Toro," demanding "redress of said wrongs under the provisions of Article 138, Uniform Code of Military Justice", and demanding "prosecution of said Commanding General and his subordinates for violation of the Uniform Code of Military Justice."

Thereafter, the accused Commanding General purported to convene a military "court of inquiry" made up of his own subordinates to investigate the charges made against him and his command by petitioner. This he was without lawful power to do.

Article 138 of the Uniform Code (*50 U. S. C. 734*) provides, in part, as follows:

> "Any member of the armed forces who believes himself wronged by his commanding officer, . . . may complain *to any superior officer who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made.* . . ."

In the instant case the complainant, under Article 138, was petitioner's client; the principal "commanding officer" against whom the complaint was made was the Commanding General at El Toro; the "superior officer" of the Commanding General to whom the complaint was made was the Commandant of the Marine Corps; it thus became the duty of the Commandant to forward the complaint to the

"officer exercising general court-martial jurisdiction over" the Commanding General. Obviously, the Commanding General could not exercise general court-martial jurisdiction over himself and had no power to convene a lawful "court", examining into the complaints against himself.

Article 138 is based on the former Article of War 121 and ultimately upon two articles, one applying to "officers" and the other to "soldiers", which first appeared in the Code of James II in 1682.

The present article is not limited, as were its antecedents, to complaints against superior officers within the regimental chain of command. The two articles, as they then existed are discussed by Winthrop (*supra*, pp. 926-36), and while remarking that "a resort to either as a remedial statute is most unfrequent in practice." Winthrop, *supra*, p. 936 points out that Article 30 of his day, "entitled indeed a soldier, 'who thinks himself wronged by any officer', to a hearing before a court of his regiment, and, if he is not satisfied with the result, to an appeal to a higher court . . ."

Even in the absence of the specific provisions of Article 138, the accused Commanding General would have been powerless to convene a lawful court in the circumstances under the general "court of inquiry" provision, Article 135 (*50 U. S. C. 731*), not only because of the inherent lack of general court-martial jurisdiction over himself (the test of jurisdiction to convene a court of inquiry in the absence of specific designation by the Secretary of a Department being the general court-martial jurisdiction

of the commander) and the requirement contained in Article 135(c) that any person whose conduct is subject to inquiry shall be designated as a party, but because of the many inhibitions placed upon the authority to convene inquiries or investigations contained in the Naval Supplement to the Manual for Courts Martial, U. S., 1951. See, for example, paragraph .0204 (pp. 26, 27) wherein it is provided as follows:

> *"In those situations where the commander concerned may be responsible for the incident or circumstances which necessitates the inquiry, the investigation should be ordered by a superior in command in the interest of obtaining an objective investigation and a determination and reporting of the unbiased facts. Under such circumstances, the officer or officers, comprising the fact-finding body should not be subordinates of the commander concerned."*

See also, Paragraph .0302 (pp. 29-30) and Paragraph .0403 (p. 71) which impose restrictions where *"any such officer can be designated a party by reason of his direct interest in the subject of inquiry"* or where *"an incident requiring investigation may reflect adversely upon the commander."*

The same principles have governed this Court in condemning and refusing recognition to a system wherein one man, in effect, acted as judge, jury and executioner. (*Re Oliver,* 33 U. S. 257, 92 L. Ed. 682.)

While similarities in their functions have been suggested (1857, 8 *Op. Atty. Gen.* 335, 347), courts of inquiry are not secret bodies to be analogized to grand juries.

(Winthrop, *Military Law and Precedents* (1920), pp. 523, 528.) A court of inquiry does not possess "inherent powers" or "common law powers" as may be said in some jurisdictions with respect to a grand jury but, where improperly convened by one having no authority to convene it, or, where improperly constituted, it, like the "grand jury" under similar circumstances, is a void body having no power or function. (*Fowlers v. United States,* 329 U. S. 187.) This Court has reached the same conclusion with respect to an alleged "congressional committee" where it has been illegally constituted or where no quorum has been present. (*Christoffel v. United States,* 338 U. S. 84; *United States v. Rumley,* 345 U. S. 42.)

Here the Government failed to establish, as it was required to do, that the "copy of a transcript" was that of a *lawful* "U. S. Marine Court of Inquiry" (having legal existence") and that such copy was thus the "property of the United States", having *some* value, however slight, as the transcript of such a lawful court of the United States. The only evidence in the record justifies the exact opposite conclusion.

To paraphrase the language of this Court in *Dynes v. Hoover* (*supra*), *the law for convening and directing the proceedings of courts of inquiry having been disregarded, everything which was done was void.—"not voidable, but void"*; and *the "court and the officers" were "all trespassers."* They were not a "court of the United States" and the "transcript" was a valueless private report of a self-established group of unlawful trespassers, not "property of the United States" having *some* value.

VII.

The Court Erroneously Excluded Evidence of the Bad Reputation for Truth, Honesty and Integrity of The Government's Witness, Thompson, An Adjudicated Insane Man, and the Sole Witness Upon Whom the Prosecution Fundamentally Relied and Whose Testimony the Court Below Concedes Was "The Evidentiary Basis of the Jury's Verdict."

Petitioner called to the stand Captain J. B. Worley, former Long Beach Captain of Police and for twenty-five years the operator of a private detective agency [R. 350]. Captain Worley testified that he had employed Thompson from July 11, 1952 to May 6, 1953, when Thompson disappeared [R. 352]. He had discussed Thompson's reputation with various people in the community. He knew what Thompson's reputation for truth, honesty and integrity was in that period [R. 353]; "it was very bad". Without objection he testified that he would not believe Thompson under oath [R. 353]. In reply to an inquiry by the court, Worley testified that Thompson "stole a lot of money from me and a lot from other people in Long Beach" [R. 354]. On motion by the prosecutor the court struck *all* of Captain Worley's testimony [R. 354].

The trial court erroneously construed the law to be that testimony of bad reputation of Thompson was admissible only if the witness knew the reputation of Thompson at the time of the commission of the offense and *not at the time of trial.* The Circuit Court held that this reputation testimony was properly stricken by the trial court because: "The witness clearly stated he was testifying to a time after the finding of the indictment." In this respect the Circuit Court erred both as to the facts and as to the law. The reputation testimony covered the period from

July 11, 1952 to May 6, 1953 [R. 352]; the indictment was not returned until June 25, 1953 [C. Tr. 2]. Thompson, the witness, had only met the petitioner within two months before December 19, 1952 [R. 142].

Both the trial court and the court below erroneously construed the law applicable to the admissibility of reputation testimony. California Code of Civil Procedure, Section 2051, made this testimony relevant and admissible. The code section expresses a general rule of evidence applicable in the Federal Courts of the United States and generally recognized as a rule of evidence.

The testimony regarding Thompson's bad reputation was not only extremely important in the case at bar, it could have been decisive. As the court below correctly stated, Thompson's testimony was *"the evidentiary basis for the verdict of the jury"* and was *"the sole support of a considerable portion of the case for the prosecution."* If the Worley testimony as to the bad reputation of Thompson had not been stricken the jury might well have acquitted petitioner since the *"main framework of the case was laid by the testimony of Thompson"* and rested solely on Thompson's credibility.

The witness, Captain Worley, and Thompson both lived in Long Beach from July 11, 1952 to May 6, 1953. Captain Worley had talked with many people in the community about Thompson's reputation for truth, honesty and integrity, traits relevant to the issues involved here. Compare, *Michelson v. United States,* 335 U. S. 469, 483. He knew the reputation to be very bad.

In any event, reputation testimony as to a witness, regardless of when it is acquired, is relevant as to the truthfulness of the witness *at the time of testimony.* Prior

reputation and contemporary reputation testimony are, of course, competent inasmuch as they are relevant to the credibility of the witness *at the time of his testimony.* (See, *Wigmore—Evidence* (3rd Ed.) Vol. V, Secs. 1617 and 1618, at p. 491.)

What is involved is the credibility of Thompson at the time of his testimony. His ability to relate things truthfully at the time he is a witness is the question before the court and the jury.

In California, where the trial was held, the Code of Civil procedure, Section 2051, provides as follows: "A witness may be impeached by the party against whom he was called, by contradictory evidence or *by evidence that his general reputation for truth, honesty, or integrity* is *bad,* . . ." (Our emphasis). It will thus be seen that a witness may be impeached by testimony that his reputation for truth, honesty and integrity *is* bad. Rule 43, Rules of Civil Procedure for the United States, provides for the form and admissibility of testimony, and states:

> "In any case, the statute or rule which favors the reception of the evidence govern and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made."

As this Court stated in the *Gordon* case, 344 U. S. 414, 417: "Where, as here, the government's case may stand or fall on the jury's belief or disbelief of one witness, his credibility is subject to close scrutiny"; so in the case at bar where, according to the court below, *"the main framework of the case was laid by the testimony of Thompson"*, which *"was the sole support of a considerable portion of the case*

for the prosecution" and "the evidentiary basis for the verdict of the jury", to strike the reputation testimony of Captain Worley, discrediting the testimony of Thompson, was certainly prejudicial. "There is a presumption of harm arising from the existence of an error committed by a trial court against the party complaining, in excluding material evidence on a trial, especially before a jury." (*Crawford v. United States,* 212 U. S. 183, 203.)

Conclusion.

Each of the questions we have presented herein are of fundamental importance in the administration of criminal justice and this Court's supervisory control thereof and require the plenary consideration and determination of this Court. In the setting in which we have presented them, none of them have been passed upon, but should be passed upon, by this Honorable Court In the event the Court grants rehearing and grants certiorari in this case and to preserve our record, we ask leave to renew and reurge additionally each of the points raised in our original petition as though fully set forth herein.

In pointing out, also, the insufficiency of the evidence which was raised in our original petition, we failed to point out that in the instant case that question of its sufficiency was raised as a due process question which this Court will always re-examine to see if the trial procedure has been fair in the light of the many things set out in the original petition. (Justice Roberts in *Snyder v. Mass,* 291 U. S. 97.) This Court will always examine a record to see if the petitioner has been accorded a fair trial guaranteed by the due process clause of the Fifth Amendment to the Constitution. It was in this setting that we urged the Court to re-examine the evidence in this "bizzare" case.

This Court has said that no conviction should rest on a confession that is forced. *Chambers v. Florida,* 309 U. S. 227, or upon evidence secured by illegal search and seizure, *Boyd v. United States,* 116 U. S. 616; *Weeks v. United States,* 232 U. S. 383; *Silverthorne Lumber Co. v. United States,* 251 U. S. 385; *United States v. Lefkowitz,* 285 U. S. 452, nor by knowing use of perjured testimony, *Mooney v. Holohan,* 294 U. S. 103. Should a conviction rest on the testimony of an adjudicated insane witness, vouched for by the Government's production of him as a credible, competent witness?

No person's conviction and sentence to imprisonment and the probable termination of a legal career should rest upon such tenuous testimony as that of an insane man whose competency was not in the first instance determined by the trial court, nor was it determined by the jury under proper instructions as how to weigh the testimony of an insane man. It is shocking to the conscience of mankind; it is contrary to the fundamental principles of justice, which lie at the base of all of our institutions. (*Herbert v. Louisiana,* 27 U. S. 312; *Francis v. Resweber,* 329 U. S. 459; *Lisenba v. California,* 314 U. S. 219; *Snyder v. Massachusetts,* 291 U. S. 97; *Irvine v. California,* 347 U. S. 128.) As said in *Irvine v. California* regarding another situation, the situation here would be "shocking" if it were not admitted.

We pray for a rehearing and for certiorari.

Respectfully submitted,

MORRIS LAVINE.

Attorney for Petitioner.

Certificate of Counsel.

I, Morris Lavine, counsel for the petitioner, hereby certify that the petition for rehearing is filed in good faith and not for the purposes of delay, and that it is based upon fundamental questions of law and fact which were either not presented in the original petition, or not fully or adequately presented therein, and which require the supervisory control over criminal justice and the plenary consideration of this Honorable Court and is restricted to these grounds.

MORRIS LAVINE,
Attorney for Petitioner.

MOTION FILED AUG 2 1956

see #327

IN THE

Supreme Court of the United States

October Term, 1956

No. 243

GEORGE E. SHELLEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Motion for Leave to File Brief Amici Curiae on Petition for Writ of Certiorari and Brief.

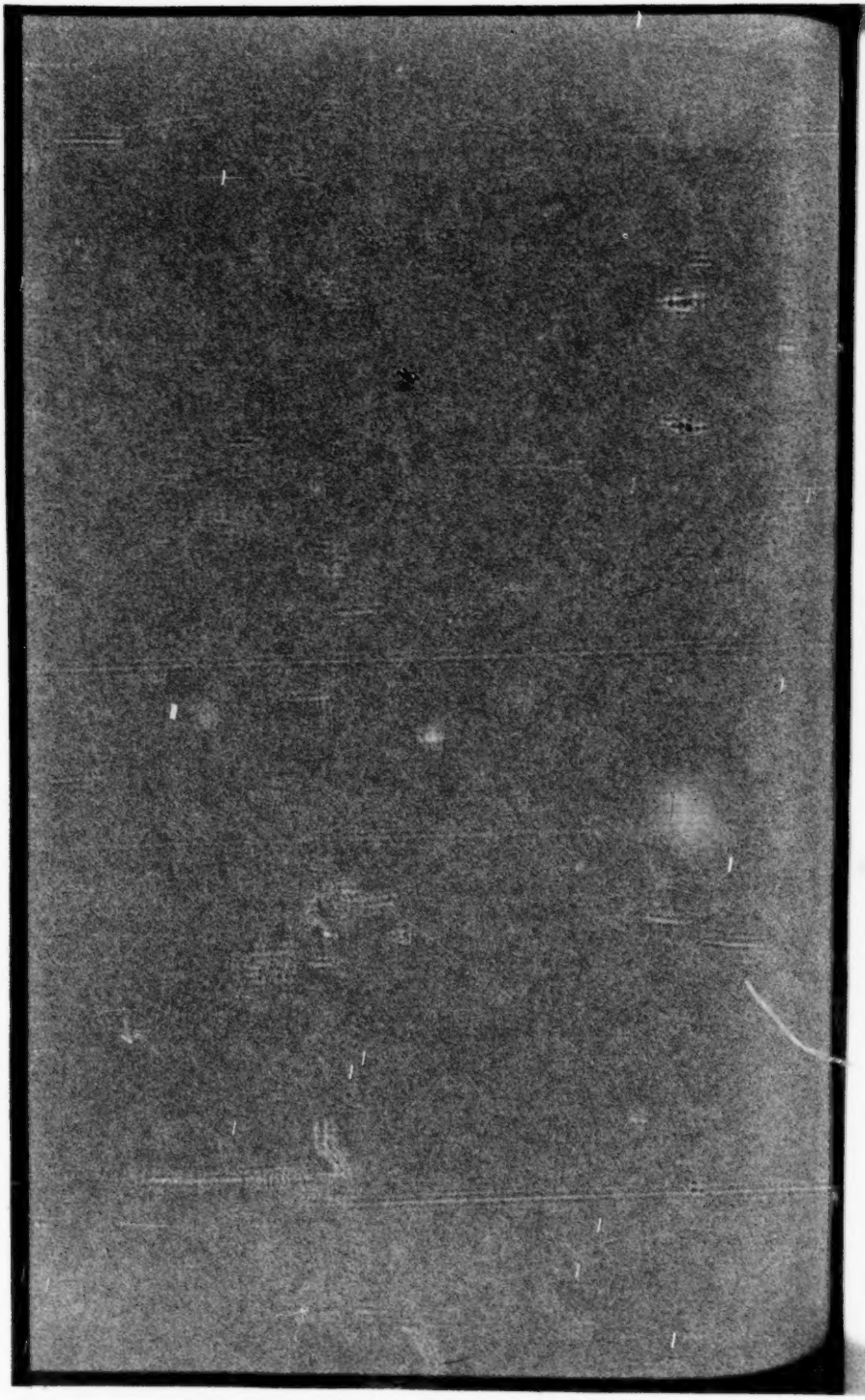
MYRON G. EHRLICH,
416 Fifth Street, N. W.,
Washington, D. C.

JAMES SUTHERLAND,
207 Security Building,
Fresno, California,

Counsel for Amici Curiae.

see #327

Parker & Son, Inc., Law Printers, Los Angeles, Phone MA. 6-9171.



SUBJECT INDEX

PAGE

Motion for Leave to File Brief Amici Curiae on Petition for Writ of Certiorari 1

Brief on Behalf of Amici Curiae 3

Statement 3

Argument 6

Point I. Public policy, as expressly enunicated by the Congress, forbids the influence of "command control" in military tribunals. That same policy should be upheld and enforced in the federal courts. The prosecution of civilian defense counsel herein arises out of an abuse and evasion of the aforesaid congressional policy and should be halted by the Supreme Court. This result can only be achieved by a grant of certiorari in the instant case 6

Point II. The independence of the bar, and the right and duty of civilian counsel to afford to military clients a full measure of legal representation in military tribunals, without reprisals by officials in command control, is in jeopardy. The preservation and protection of such independence requires a grant of certiorari in the instant case 10

Conclusion 14

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Armstrong v. Armstrong, 100 L. Ed. (Adv. Op.) 460	14
Gallagher v. Municipal Court, 31 Cal. 2d 784, 192 P. 2d 905	12
Girouard v. United States, 328 U. S. 61	11
Humphrey v. Smith, 336 U. S. 695, 69 S. Ct. 830, 93 L. Ed 986	7
United States v. Ferguson, 5 USCMA 68, 17 CMR 68	6
United States v. Gordon, 1 USCMA 255, 2 CMR 161	6
United States v. Green, 5 USCMA 610, 18 CMR 234	8
United States v. Hunter, 3 USCMA 497, 13 CMR 53	6
United States v. Isbell, 3 USCMA 782, 14 CMR 200	6
United States v. Littrice, 3 USCMA 487, 13 CMR 43	6
United States v. Long, 5 USCMA 572, 18 CMR 196	7
United States v. McMahan, 6 USCMA 709, 21 CMR 31	7, 8
United States v. Morelli, 4 USCMA 276, 15 CMR 276	8
United States v. Navarre, 5 USCMA 32, 17 CMR 32	6
United States v. Parker, 6 USCMA 75, 19 CMR 201	7
United States v. Whitley, 5 USCMA 786, 19 CMR 82	7
United States v. Zager, 5 USCMA 410, 18 CMR 34	7

STATUTES

Uniform Code of Military Justice (50 USC (Chap. 22) 551-736)	6
Uniform Code of Military Justice, Art. 32(b)	7
Uniform Code of Military Justice, Art. 38(b)	7
United States Code, Title 50, Sec. 613	7
United States Constitution, Sixth Amendment	7

MISCELLANEOUS

Canons of Professional Ethics of the American Bar Association, Sec. 15	8
Canons of Professional Ethics of the American Bar Association, Sec. 37	8
Cushman, Civil Liberty in Public Opinion in Safeguarding Civil Liberty Today (1945), p. 105	11
Manual for Courts-Martial (Naval Supp.), Sec. 0116	8
Stimson and Bundy, Active Service in Peace and War, Introduction, p. xxi	10

IN THE

Supreme Court of the United States

October Term, 1956

No. .....

GEORGE E. SHIBLEY,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Motion for Leave to File Brief Amici Curiae on Petition for Writ of Certiorari.

The *amici* whose names are appended to the Brief herein, by their counsel, respectfully ask leave to file the within Brief *Amici Curiae* on behalf of the petitioner in the above entitled cause.

Counsel for the *amici* are familiar with the questions involved in the case and the scope of their presentation, and believe that there is need for additional argument on the relevant points set forth in the Brief annexed hereto.

The interest of *amici* in this litigation arises principally from the fact that they are all members of the Bar concerned with preserving the rights of civilian counsel in their representation of members of the armed forces before military tribunals and the independence of the Bar

generally as an aspect of the constitutional right of all persons to the effective assistance of counsel.

The brief annexed hereto is not a brief on the merits of the case, but is submitted prior to consideration of a petition for writ of certiorari to urge the Court to grant that petition. As responsible members of the Bar, we understand that the Court, under a heavy workload, must restrict its attention to issues of great importance. As practicing attorneys, we are profoundly concerned with the administration of justice and particularly with the public policies touching the advocate's functions in that domain. We stand united in our firm opposition to practices which tend to weaken or undermine the ability or will of an advocate to measure up to his great responsibility to his client and to society. We have joined together respectfully to invite the attention of the Court to the effect of the petitioner's conviction upon all attorneys who, in defense of accused clients, find it their duty vigorously to challenge or condemn the acts and practices of highly placed government officials. We urge that the questions presented for decision have a special and important relationship to the proper administration of justice and the law military, and that therefore certiorari should be granted.

Counsel for the petitioner have consented to the filing of the Amicus Brief but counsel for the United States has declined to give his consent.

Respectfully submitted,

MYRON G. EHRLICH,

JAMES SNEDEKER,

Counsel for Amici Curiae.

IN THE

Supreme Court of the United States

October Term, 1956

No. .....

GEORGE E. SHIBLEY,

Petitioner,

vs.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF ON BEHALF OF AMICI CURIAE.

Statement.

George Shibley, the petitioner, has been engaged in the practice of law in Long Beach, California, since 1935. In 1952, he was retained to and did represent one Master Sergeant Bennette, United States Marine Corps, in general court-martial proceedings at the Marine Air Base, El Toro, California. Convicted of the comparatively minor offense of transporting Marine personnel for hire in violation of existing regulations, the accused was sentenced to six months' confinement at hard labor, a fine, reduction in rank to that of private, plus discharge with a bad-conduct discharge. Petitioner vigorously, but in vain, pleaded with Marine officials for recognition and respect for the rights of the accused as set forth in the Uniform Code of Military Justice, took an appeal from the findings

and sentence of the court-martial, and with the aid of other counsel secured a reversal and completely cleared his client.

During the course of these proceedings, petitioner wrote a letter to the Commandant, United States Marine Corps, on behalf of his client, challenging the authority of the local Marine officials to proceed against his client, and making serious accusations against certain of such officials, including charges of failure to appoint selected available military counsel, of destruction and falsification of records, procurement of perjured testimony, and coercion of witnesses. Thereafter, the attention of local officials was focused upon the petitioner. He was deprived of the assistance of military defense counsel previously furnished, denied further access to law books at the Air Base, and was subpoenaed as a witness before a court of inquiry convened by the commanding general at the Air Base for the alleged purpose of investigating the derelictions which were the subject of the petitioner's accusations. The petitioner challenged the jurisdiction of the court of inquiry on the ground that it was convened to investigate the petitioner and that it was convened by an officer who was, in effect, the accuser, and on the further ground that with respect to the petitioner's accusations, the purported subject of inquiry, the officer who convened the court was himself an accused. Petitioner refused to answer various questions on various grounds, including refusal to disclose matters covered by the attorney-client privilege. After testifying for several days, petitioner believed he was excused as a witness. Two or three days later, the court of inquiry, without notice, issued a warrant of attachment for petitioner, had the petitioner arrested in his Long Beach office by four armed military policemen and forcibly taken to the Air Base at El Toro.

The court of inquiry charged petitioner with contempt, and at the instance of local military officials, petitioner was tried in the federal district court on a multiple count information; the court granted judgment of acquittal as to three counts, the jury acquitted petitioner on three counts and the three counts as to which no conclusion was reached were subsequently dismissed. Following the filing of the information, the local military officials then aided in procuring the indictment of petitioner on charges of various counts, all of which related to the disappearance of a carbon copy of the transcript of the proceedings of the court of inquiry. This copy of the transcript had been stolen by one Thompson, named as a co-defendant in the federal case, and the effort was to connect petitioner with this theft. Thompson, a mental patient who had been confined in three mental institutions, was hostile to petitioner; he had been deterred by petitioner from associating with a 15 year old girl upon whom, it was later discovered, Thompson committed statutory rape; this girl had been paroled in custody of petitioner's wife and had lived in petitioner's household; Thompson, it appeared, had stolen the transcript to send to a prominent columnist of a national newspaper syndicate. Almost seven months after his arrest, Thompson changed his not guilty plea to that of guilty, was released on his own recognizance, testified against petitioner, and went unpunished. His accomplice, a Marine corporal, also testified against petitioner and not only went unpunished but was given an honorable discharge from the service. Petitioner was the only civilian attorney involved in the court-martial proceedings, and was the only person connected with those proceedings who was subjected to punishment. He received a three-year sentence.

ARGUMENT.

POINT I.

Public Policy, as Expressly Enunciated by the Congress, Forbids the Influence of "Command Control" in Military Tribunals. That Same Policy Should Be Upheld and Enforced in the Federal Courts. The Prosecution of Civilian Defense Counsel Herein Arises Out of an Abuse and Evasion of the Aforesaid Congressional Policy and Should Be Halted by the Supreme Court. This Result Can Only Be Achieved by a Grant of Certiorari in the Instant Case.

In enacting the Uniform Code of Military Justice (50 USC (Chap. 22) 551-736), Congress atttempted to insulate the trial of accused persons from the wrongful influence of those in command, by enumerating certain rights of the accused, by forbidding unlawful interference and tampering, and by providing a punishment for noncompliance with procedural rules. The history of unlawful command influence and the importance attaching to it in the Congressional hearings on the Uniform Code are fully understood and appreciated by the United States Court of Military Appeals. *United States v. Littrice,* 3 USCMA 487, 13 CMR 43 (1953). That court has shown its determination to eliminate "command control" of the judicial process in the armed forces. Where any question of an unlawful attempt to influence the course of justice has arisen, all doubts have been resolved by that court in favor of the accused. *United States v. Gordon,* 1 USCMA 255, 2 CMR 161 (1952); *United States v. Littrice,* 3 USCMA 487, 13 CMR 43 (1953); *United States v. Hunter,* 3 USCMA 497, 13 CMR 53 (1953); *United States v. Isbell,* 3 USCMA 782, 14 CMR 200 (1954); *United States v. Navarre,* 5 USCMA 32, 17 CMR 32 (1954); *United States v. Ferguson,* 5

USCMA 68, 17 CMR 68 (1954); *United States v. Zager,* 5 USCMA 410, 18 CMR 34 (1954); *United States v. Whitley,* 5 USCMA 786, 19 CMR 82 (1955).

In a court-martial, the accused has a right to be represented by civilian counsel if provided by the accused, or by military counsel of his own selection if reasonably available, or by defense counsel duly appointed. The accused may have both selected counsel and appointed counsel. UCMJ, Art. 38(b). 50 USC Sec. 613; *United States v. Long,* 5 USCMA 572, 18 CMR 196 (1955). Furthermore, he has the right to counsel prior to the convening of a general court-martial and during the pretrial procedures. UCMJ, Art. 32(b). This latter right is a substantial protection. *United States v. McMahan,* 6 USCMA 709, 718, 21 CMR 31 (1956), citing *Humphrey v. Smith,* 336 U. S. 695, 69 S. Ct. 830, 93 L. Ed. 986 (1949), and *United States v. Parker,* 6 USCMA 75, 19 CMR 201 (1956). The accused is entitled, not simply to counsel, but to the "effective assistance of counsel." The right is the same basic right as that which is included in the Sixth Amendment (irrespective of the question whether that Amendment is applicable to military personnel). Encroachment thereupon has been held to constitute a lack of due process of law. ACM S-3514, Mathis (1952) 6 CMO 661, 666-667. The view of the United States Court of Military Appeals is that:

> "The uniformed accused, as well as his civilian counterpart, is justly entitled to receive from his attorney a full measure of assistance. . . . Defending counsel . . . has a solemn duty to defend unreservedly the interests of the accused he has sworn to protect, and fear of disfavor should not deter him from using all honorable means to protect his client's cause. No system of justice can flourish

> if the representation afforded an accused person is to be neglected because of fear of reprisal. Nor can military justice succeed if those . . . who must defend an accused inadequately protect him because they dare not assert every right guaranteed by the Code."

United States v. McMahan, 6 USCMA 709, 717-718, 21 CMR 31 (1956). Speaking of defense counsel, Section 15 of the Canons of Professional Ethics of the American Bar Association states: "No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty." This canon is quoted and embodied in the rules relating to justice in the naval service, rules which govern the United States Marine Corps as well as the United States Navy. Naval Supplement to Manual for Courts-Martial, Sec. 0116.

The attorney-client privilege, as embodied in Section 37 of the Canons of Professional Ethics of the American Bar Association ("It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment . . .") is respected in the military services as part of the public policy, and doubtful communications are treated as privileged. *United States v. Morelli,* 4 USCMA 276, 15 CMR 276 (1954); *United States v. Green,* 5 USCMA 610, 18 CMR 234 (1955).

Where defense counsel has been beset by officials' attempt to influence military tribunals in an unlawful manner, where counsel's zealous but legitimate efforts to protect the accused's interests have been thwarted, or where the accused's guaranteed rights have been denied, yet the accused has been convicted, the reviewing authori-

ties and courts within the military establishment have acted strongly to correct the injustice. Where the accused has requested the assignment of individual military counsel of his own selection, and the request has been denied despite the presence of the requested counsel and the absence of any circumstances indicating that he was not reasonably available, the findings and sentence have been reversed. ACM 6062, Hanson (1953), 8 CMO 671.

In the instant case, however, the conviction of the petitioner's client was reversed upon the merits of the court-martial record, and the treatment of his civilian counsel by the military superiors of the client did not come to the attention of the court-martial reviewing authorities. Command influence then took a new tack. Successful defense counsel was subjected to military investigation, military arrest, trial for alleged contempt, indictment, and trial in the federal district court. Such apparent persecution would not have been condoned by reviewing military tribunals, and should, in the interest of the preservation of consistent public policy, be carefully scrutinized by the United States Supreme Court. The criminal prosecution of this petitioner has a direct impact upon Congressional policy and, unless reversed, will lead to wide evasion and erosion of that policy.

POINT II.

The Independence of the Bar, and the Right and Duty of Civilian Counsel to Afford to Military Clients a Full Measure of Legal Representation in Military Tribunals, Without Reprisals by Officials in Command Control, Is in Jeopardy. The Preservation and Protection of Such Independence Requires a Grant of Certiorari in the Instant Case.

Lawyers must be prepared in the interests of their clients to risk resentment from those in high places. This is an occupational hazard which often can be avoided only by sacrificing duty and the ends of justice to expediency and self-interest. The obligations imposed upon lawyers by the Canons of Professional Ethics are designed not only to protect the interests of an individual client but also to preserve a society in which the rights of all citizens shall be maintained against aribtrary authority. They flow from the very essence of our concepts of the functions and limitations of a republican form of government.

We agree with Henry L. Stimson that ". . . without a bar trained in the traditions of courage and loyalty our constitutional theories of individual liberty would cease to be a living reality" and that "many countries possessing constitutions and bills similar to our own" have "nevertheless lost their liberties because they did not possess a bar with sufficient courage and independence to establish these rights. . . ." Henry L. Stimson, Introduction page xxi, on Active Service in Peace and War, Stimson and Bundy. What Erskine said with respect to England in 1792 remains true with respect to our country today: "From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the court where

he daily sits to practice, from that moment the liberties of England are at an end."

It would seem to follow that lawyers have the obligation to address themselves to the courts, as we do by means of this brief, for the purpose of seeking to preserve and strengthen the role of lawyers as officers of the court. When it appears that prosecution may have been instituted and punishment may have been imposed upon a lawyer because of his vigorous defense of a client, the position of all citizens before the law is rendered less secure.

The Bar of our country has the proud tradition. Lawyers again and again have formed the front ranks of resistance to tyranny. We look back with pride upon the defense by John Adams and Josiah Quincy in 1770 of the British soldiers tried for participating in the "Boston Massacre," and upon Andrew Hamilton's defense of the printer Zenger when the latter was charged with the crime of criticizing his British Majesty. In more recent time we recall Charles Evans Hughes' defense of the ten expelled socialist assemblymen in New York, Homer Cummings' appearance for the pacifist Girouard (*Girouard v. United States,* 328 U. S. 61), and the appearance of many attorneys for the unpopular minority of the moment. It is then apparent that the record of the service rendered to the cause of freedom by American lawyers is a long and honorable one. "It stretches" says Professor Cushman, "all the way from James Otis, defending two Boston merchants against the tyrannical Writs of Assistance in 1761 down to Wendell Wilkie, defending the communist, William Schneiderman, in the Supreme Court in 1943." Cushman, Civil Liberty in Public Opinion in Safeguarding Civil Liberty Today, 1945, p. 105. For every such case which written history records either because of its prominence or that of its

counsel, there are thousands that are noted in no history books. Yet it is the proper handling of these cases involving little known causes and counsel of no great fame which is vital to the integrity of our judicial system. The lawyers who handle such cases must be afforded fearless advocacy. If, on behalf of the hundreds of Sergeants Bennette who yearly face the possibility of unjust persecution, resistance to high authority, military or civil, is weakened, erosion of the judicial process is begun. Lawyers and the courts should stand like flint against this. Not the lawyers alone but society has a "fundamental interest . . . in maintaining an independent bar." *Gallagher v. Municipal Court,* 31 Cal. 2d 784, 795, 192 P. 2d 905 (1948).

In recent times the danger arising from the failure to maintain these high standards of fidelity to the sworn duty of the Bar has aroused serious concern. The American Bar Association has found it necessary to stress "the rights and duties of defendants to the benefit of assistance of counsel and the duty of the bar to provide such aid even to the most unpopular defendants." Los Angeles Daily Journal, August 16, 1955. A similar resolution has been adopted by the Board of Governors of the State Bar of California. The American Bar Association's Special Committee on Individual Rights as Affected by National Security, stated in a report dated July 30, 1953: "The Bar looks back with pride upon occasions where this duty was nobly discharged. It must deplore and seek to overcome any obstacles which may prevent its discharge in the future." The conviction of petitioner on the record in this case seems to us to constitute such an obstacle.

If a case like that of petitioner is not subjected to the careful scrutiny of this Court, that which is strong and

good in the Bar's tradition will suffer and that which we deplore may well draw sustenance. For an attorney to be found guilty of a felony for allegedly conspiring to steal a transcript which he should have been handed as a matter of right, is itself a cause for some concern. When that conviction depends upon the testimony of a witness who has but recently been adjudged and confined as an incompetent, the gravity of the issue is increased. When that witness, an admitted thief with an apparent independent motive for the theft, is released on his own recognizance on the first day that his cooperation with the prosecution is made manifest, when he escapes all punishment after a plea of guilty for that and other undenied offenses, and when a Marine corporal who admittedly participated in the planning of the theft, is not even prosecuted, the conviction of petitioner and the three-year sentence meted out to him must cause serious alarm. When all this arises from a background of fearless and successful advocacy by petitioner involving legal attacks upon high officers, and when those officers cause his arrest by military police and initiate a series of criminal prosecutions against petitioner, we feel that lawyers should not remain silent. If we do, the next Sergeant Bennette may well find it impossible to obtain the kind of defense which it is our duty as members of the Bar to secure for him.

Our collective concern is with the proposition that the legal questions presented by the petition in this case be evaluated and considered in the light of its impact upon the functioning of lawyers and courts in the administration of full and equal justice to every man and woman in our land. We press upon the Court the view that the case in its entirety relates so significantly to the independence of the Bar and to the administration of justice that it merits more than "the inevitably cursory

consideration that is normally given in a case on the preliminary round. . . ." Mr. Justice Frankfurter, joining in the opinion of the Court in *Armstrong v. Armstrong,* 100 L. Ed. (Adv. Op.) 460, 464. Its importance, we believe, necessitates the careful consideration of the case which, as a practical manner, can only follow a grant of certiorari.

Conclusion.

It is urged on behalf of attorneys generally, by the undersigned as representative members of the Bar: first, that the established public policy of suppressing the unlawful influence over military tribunals of those in military command should be declared to include the suppression of such influence over prosecutions in the federal courts; second, that reprisals by those in military command against civilian counsel who have been successful in defending their clients in court-martial proceedings have a strong tendency to jeopardize the independence of the Bar; and, third, that consideration of either of the first two conclusions demands a grant of certiorari in the instant case.

Respectfully submitted,

MYRON G. EHRLICH,

JAMES SNEDEKER,

Counsel for Amici Curiae.

WILLIAM B. ENRIGHT,
611 Bank of America Bldg.,
San Diego, California;

DONALD E. FEELY,
11544 E. Whittier Boulevard,
Whittier, California;

NORMAN GOTTLIEB,
507 Heartwell Building,
Long Beach, California;

THOMAS D. GRIFFIN,
512 Times Building,
Long Beach, California;

EMMANUEL GYLER,
507 Heartwell Building,
Long Beach, California;

CHARLES K. HACKLER,
756 South Broadway,
Los Angeles, California;

RUSSELL L. HOFVENDAHL,
1114 Bank of America Bldg.,
San Jose, California;

ELDON J. KOORSTAD,
246 West Compton Boulevard,
Compton, California;

ROBERT E. KRAUSE,
414 Heartwell Building,
Long Beach, California;

DAVID I. LIPPERT,
629 South Hill Street,
Los Angeles, California;

CHARLES S. LITWIN,
914 Heartwell Building,
Long Beach, California;

ROBERT H. LUND;
320 Pine Avenue,
Long Beach, California;

JAMES MONROE,
800 North Broadway,
Santa Ana, California;

WILLIAM T. PILLSBURY,
312 Kennebec Building,
Long Beach, California;

PHILIP E. POPPLER,
1104 Security Building,
Long Beach, California;

HARRY T. SHAFER,
122 West Compton Boulevard,
Compton, California;

RAYMOND C. SIMPSON,
110 West Ocean Boulevard,
Long Beach, California;

WILLIAM O. WANZER,
914 Heartwell Building,
Long Beach, California,

Amici Curiae.

MORRIS ABRAHAM,
215 W. 7th Street,
Los Angeles, Calif.;

EPHRAIM ADAMS,
1905 W. San Carlos Street,
San Jose, Calif.;

MELBERT B. ADAMS,
681 Market Street,
San Francisco, Calif.;

JOSEPH L. ALTAGEN,
208 W. 8th Street,
Los Angeles, Calif.;

GEORGE T. ALTMAN,
233 S. Beverly Drive,
Beverly Hills, Calif.;

GEORGE R. ANDERSON,
240 Montgomery Street
San Francisco, Calif.;

NATHAN ASIMOW,
2024 W. 6th Street,
Los Angeles, Calif.;

JAMES ASTLE, JR.,
9371 Washington Blvd.,
Culver City, Calif.;

MICHAEL B. ATKINS,
25 Broad Street,
New York, New York;

ARTHUR AUERBACH,
504 Van Ness Avenue,
San Francisco, Calif.;

C. H. AUGUSTINE,
216 Orpheum Theatre Bldg.,
San Diego, Calif.;

ROBERT V. G. AUSTIN,
1023 Times Bldg.,
Long Beach, Calif.;

BEVERLY AXELROD,
704 Market Street,
San Francisco, Calif.;

WILLIAM L. BAKER,
15851 E. Whittier Blvd.,
Whittier, Calif.;

GEORGE H. BARNETT,
227 Bank of America Bldg.,
San Jose, Calif.;

SELMA B. BARNETT,
14416 Victory,
Van Nuys, Calif.;

FRANK S. BARRETT,
227 Bank of America Bldg.,
San Jose, Calif.;

KENNETH A. BARWICK,
7880 Broadway,
Lemon Grove, Calif.;

CHARLES A. BEARDSLEY,
1516 1st Western Bank Bldg.,
Oakland, Calif.;

J. E. BEAN, JR.
586 N. 1st Street,
San Jose, Calif.;

VICTOR H. BEAUZAY,
Commercial Building,
San Jose, Calif.;

FRANK B. BENNETT,
340 Bank of America Bldg.,
San Diego, Calif.;

LEON BENWELL,
4368 Village Road,
Long Beach, Calif.;

JERRY S. BERK,
3030 Temple Street,
Los Angeles, Calif.;

PERRY BERTRAM,
608 S. Hill Street,
Los Angeles, Calif.;

GEORGE C. BLACK,
3907 Duquesne Avenue,
Culver City, Calif.;

MAXWELL S. BOAS,
10568 Putney Road,
Los Angeles, Calif.;

LEONARD B. BOUDIN,
25 Broad Street,
New York, N. Y.;

HARRIET BOUSLOG,
63 Merchant Street,
Honolulu, T. H.;

ERNEST J. BRADY, JR.,
109 E. Impeiral Hgwy.,
Brea, Calif.;

WILLIAM M. BRANDON,
6829 Rita Avenue,
Huntington Park, Calif.;

FRANKLYN K. BRANN,
470 Flood Bldg.,
San Francisco, Calif.;

JOHN A. BRANT,
216 Bank of America Bldg.,
San Diego, Calif.;

H. GREGORY BRILLIANT,
756 S. Broadway,
Los Angeles, Calif.;

ROBERT L. BROCK,
1741 Ivar,
Hollywood, Calif.;

ALLAN BROTSKY,
785 Market Street,
San Francisco, Calif.;

BERTRAM J. BROWN,
524 B Street,
San Diego, Calif.;

GILBERT T. BROWN,
44—65th Place,
Long Beach, Calif.;

JOSEPH A. BROWN,
690 Market Street,
San Francisco, Calif.;

SAM BUBRICK,
322 N. Avenue 19,
Los Angeles, Calif.;

CARLYLE O. BUCKNER,
303 Orpheum Theatre Bldg.,
San Diego, Calif.;

THOMAS J. BURKE,
504 Granger Bldg.,
San Diego, Calif.;